In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

PETITION FOR REHEARING

The United States of America, by the Solicitor General, respectfully prays for a rehearing of this case or for other appropriate relief if rehearing be not granted.

The appeal in this case presented three issues: (1) whether there had been a showing of "good cause" for the district court's order to produce, as required by Rule 34; (2) whether the documents ordered produced involved the "work product" of a lawyer and were thus not within the limits of per-

missible discovery; and (3) whether they were "privileged" and thereby excepted from Rule 34.

The above questions, left undetermined by this Court's *per curiam* order of affirmance, are of considerable importance in the trial of civil actions in the federal courts. Increasing use is being made of the discovery provisions of the Federal Rules of Civil Procedure, and the uncertainty as to whether there was an even division of this Court on each or on any one of the issues presented in this case will further promote diversity in the rulings of federal district courts.

We submit that in these circumstances a rehearing is clearly in the public interest if there is any possibility that it might lead to a majority decision.[1] The Government particularly calls attention to the issue raised both here and in the district court as to the adequacy of the showing of good cause for the production ordered by the district court. It was the Government's position, in brief and in oral argument, that this is the threshold question in the case. We now wish to reaffirm that stand since certain questions asked Government counsel at argument indicate that our position may have been misunderstood.

The district court dismissed the action for fail-

[1] Under paragraph 1 of Rule 33 of the Rules of this Court, the grounds of a petition for rehearing are not confined, as they are under paragraph 2 of that Rule dealing with rehearing of orders on petitions for writs of certiorari, to "intervening circumstances of substantial or controlling effect" or to "other substantial grounds available to petitioner although not previously presented."

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ure to comply with its order to produce certain documents, and the sole basis for its order to produce was The Ohio Oil Company's motion under Rule 34. That Rule authorizes an order to produce upon motion of any party "showing good cause therefor." Such a showing is essential to a valid order to produce, and the district court's judgment of dismissal cannot stand unless a valid order to produce has been violated.

The Ohio Oil Company's motion constituted a blanket demand for all documents falling within certain broad categories. There was no specification of the defendant's need for such documents other than a statement so generalized that, if it will suffice, the good cause showing required by the Rule is nothing more than verbal formalism. If the good cause requirement is satisfied by a conclusory allegation, such as made here, that the documents sought may aid counsel in preparing the cause for trial, it is merely a *pro forma* requirement.

The very breadth of the subject matter of discovery under Rule 34 demands adherence to the requirement that the moving party particularize his need for discovery of the documents which he seeks. The Rule, as its scope is defined by reference to Rule 26(b), embraces whatever "appears reasonably calculated to lead to the discovery of admissible evidence." If a party need show, by way of good cause for production, no more than

conjecture that his preparation for trial will be facilitated by discovery of all the documents relating to the case in the possession of an opposing party, the Rule becomes an instrument for a dragnet exploration never heretofore sanctioned by law. Although there would thus seem to be grave doubts as to the adequacy of the showing of good cause made in this case, any failure in this respect is now overlooked or condoned if this Court's *per curiam* affirmance of the judgment of dismissal stands. The effect of such affirmance is that, notwithstanding such doubts, the Government is barred from bringing to trial a serious charge of violation of the antitrust laws.

The district court made no statement of its reasons for denying the Government's contention that good cause had not been shown. In the circumstances, this Court might conclude that on the present record it is not clear whether the issue which is before it as to showing of good cause presents the question of an abuse of discretion by the district court in ruling thereon or the question of misinterpretation of Rule 34 by construing it as satisfied by a purely perfunctory allegation.

The Government's reply brief in this Court made it clear that there is no basis for the appellees' contention that the Government did not make any objection in the district court founded upon inadequacy in the showing of good cause. And there

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is nothing in the record to indicate that, because attention was focused upon some other issue in the later stages of the proceedings below, the Government, as the appellees now contend, abandoned it. The district court did not make any such finding, and the point never was abandoned.

We therefore pray that this Court, if it is unwilling to grant rehearing, set aside the judgment of dismissal and remand the cause to the district court with directions to rule upon the showing of good cause in the light of all pertinent factors, including any further showing thereon which the moving party may choose to make.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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PHILIP B. PERLMAN,
Solicitor General.

MAY, 1950.

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